

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 FULL CIRCLE UNITED, LLC,

4 Plaintiff,

5 -vs-

Civ. Action No. 1:20-cv-03395

6 BAY TEK ENTERTAINMENT, INC.,

7 Defendant.

8 BAY TEK ENTERTAINMENT, INC.,

9 Counterclaim Plaintiff,

10 -vs-

11 FULL CIRCLE UNITED, LLC,

12 Counterclaim Defendant,

13 and

14 ERIC PAVONY,

15 Additional Counterclaim Defendant.

16 CONFIDENTIAL

17 Videotape Examination of RAYMOND DRAGON,
18 taken at the instance of the Plaintiff, under and
19 pursuant to the New York Rules of Civil Procedure,
20 before Dawn M. Lahti, a Certified Realtime Reporter,
21 Registered Professional Reporter and Notary Public
22 in and for the State of Wisconsin, with all
23 participants appearing via Zoom videoconference, on
24 July 8, 2022, commencing at 10:11 a.m. and
25 concluding at 4:18 p.m.

1 A I looked at them just because it's always good
2 to refresh one's knowledge and make sure that
3 your existing beliefs are consistent with that.

4 Q And what's your understanding as to New York
5 law on lost profits?

6 A Okay. First of all, can you be more specific?
7 I mean, you've asked a very general question
8 here.

9 Q Do you have an understanding as to if there is
10 a standard of proof for lost profits under New
11 York law?

12 A Yes. My understanding is that the standard is
13 what's called reasonable certainty.

14 Q And what is your understanding of the
15 reasonable certainty standard?

16 A Okay. First, I'm not an attorney, so I'm not
17 giving a legal opinion here. I'm just giving a
18 layman's definition of reasonable certainty.
19 But my understanding of reasonable certainty
20 would be that if, for example, you were doing a
21 forecast that would be data to support the
22 forecast that at the time was considered the
23 likely or reasonable future for a business and
24 that the calculation model that is being used
25 has no significant errors or omissions that

1 would throw off the calculation, so it's a
2 combination of verifiable market-based data and
3 an accurate model that provides I think what an
4 average person would say, okay, that the data
5 is reasonable, it's supported, and the model
6 has got no significant errors so that the
7 calculation using that data would be reasonably
8 certain.

9 Q And is it your understanding that the
10 reasonable certainty standard applies to lost
11 profits calculations; is that right?

12 A Yes.

13 Q And that's a different standard than what would
14 be applied than if you were doing an evaluation
15 of an existing business, correct?

16 A No, not necessarily.

17 Q So you're aware of the fact that in a lost
18 profits calculation, you're talking about a
19 hypothetical world that didn't occur, correct?

20 MR. WILLIAMS: Objection to form.

21 THE WITNESS: Yes. It's a
22 hypothetical calculation, that's correct.

23 BY MR. SKIBELL:

24 Q And when one values an existing business, it's
25 an existing current, not hypothetical,

1 MR. WILLIAMS: Are we going off the
2 record or staying on for this?

3 MR. SKIBELL: He said it would only
4 take a minute. I don't really care.

5 THE WITNESS: Okay.

6 BY MR. SKIBELL:

7 Q All right. In any event, what we're going to
8 ask you about is what is on page 11 here. And
9 you see that there is a sentence before the
10 first bullet point and it reads, "The Smith
11 report is also premised upon numerous untenable
12 assumptions including but not limited to."

13 You'll see the first assumption
14 there is the following which I'll read, "As is
15 apparent from the Smith report and the
16 documentation reviewed, there is no written
17 agreement between the parties stating that BT
18 will manufacture any customized Skee-Ball Live
19 Lanes whatsoever, no less the number 1,750;
20 again, FC has claimed an oral agreement only to
21 manufacture 26 custom lanes."

22 So if I understand correctly,
23 Mr. Dragon, you reached the conclusion here
24 that there's no agreement between Bay Tek and
25 Full Circle that would require Full Circle

1 to -- I mean, Bay Tek to produce any lanes for
2 Full Circle; is that right?

3 A I said no written agreement.

4 Q There's -- in your opinion -- are you reaching
5 the opinion that there's no written agreement
6 that would require Bay Tek to manufacture any
7 lanes for Full Circle; that's right?

8 A That's my understanding.

9 Q And that's based on your review of the written
10 agreements in this case?

11 A Review of the documentation, yes.

12 Q And you see the next sentence reads, "The Smith
13 report nonetheless attempts to concoct such an
14 obligation by virtue of an agreement by BT to
15 exercise 'best efforts' under the written
16 agreement and extrapolate lost profits from
17 there."

18 The next sentence reads, "This
19 assumption is unhinged from any explicit
20 guarantee or promise by BT to supply anything
21 tangible to FC from which a lost profits
22 calculation can even be made."

23 So if I understand correctly,
24 Mr. Dragon, you reviewed the best efforts
25 clause and the license agreement in this case?

1 A I noted that it was in there, yes.

2 Q And you found that this agreement -- that the
3 best efforts clause does not require Bay Tek to
4 manufacture any lanes for Full Circle, correct?

5 A That's my understanding.

6 Q Now, did you review any deposition testimony
7 relating to the license agreement?

8 A I'm not sure. I may have.

9 Q Is any identified in your expert report?

10 A I didn't review any deposition testimony at the
11 time this report was written. The depositions
12 hadn't been taken.

13 Q After this report was written, did you review
14 any deposition testimony?

15 A I looked over some depositions, but I don't
16 recall anything dealing with the subject.

17 Q Which depositions did you look over?

18 A I think it was Pavony's first deposition and
19 the other gentleman's first deposition.

20 Q Is that gentleman a Full Circle witness?

21 A Yeah. It was -- I'm trying to remember his
22 name. It was like Wikman.

23 Q Eric Wikman?

24 A I believe that's the person, yes.

25 Q Did you review all of those depositions or only

1 THE WITNESS: Golden Tee leagues?

2 BY MR. SKIBELL:

3 Q Well, I'll --

4 A I'm not sure what you're talking about there.

5 Q Are you familiar with an arcade game that
6 appears in bars where people play golf?

7 MR. WILLIAMS: Objection to form.

8 THE WITNESS: You're going to want me
9 to spend a lot of time in bars. I imagine
10 there's all kinds of games that are in bars.

11 BY MR. SKIBELL:

12 Q Did you look -- you testified earlier about --
13 let me rephrase the question.

14 Do you recall earlier testimony
15 about Yerba Mate that when calculating growth
16 curves, you looked at similar beverages that
17 were farther along the life cycle in
18 Yerba Mate?

19 Do you recall that, Mr. Dragon?

20 A Yes.

21 Q So would you agree with me that games in bars
22 that were farther along than Skee-Ball Live
23 would be a useful metric in considering whether
24 Skee-Ball Live in bars was a business that
25 would match up with how the current prototype

1 lanes are generating revenue?

2 A It would depend on the nature of the games and
3 whether they were truly comparable. The
4 Skee-Ball game is a very, very old-tech game.

5 I think a lot of game players
6 these days are much more interested in video
7 games that have, you know, high levels of
8 animation, et cetera.

9 Q So are you familiar with bowling, Mr. Dragon?

10 A Am I familiar with bowling?

11 Q Yeah, the sport of bowling.

12 A Yes, I've heard of bowling.

13 Q So in that sport, you throw a ball at pins,
14 right?

15 A That's correct.

16 Q And in Skee-Ball, you throw a ball at little
17 holes, right?

18 A That's correct.

19 Q And I assume you're aware that bowling alleys
20 regularly serve alcohol. Are you aware of
21 that?

22 A Some do. Some don't. I don't know what the
23 percentage is, but most bars don't have bowling
24 alleys.

25 Q So a bowling alley would be too large for a